Supreme Court, U.S.
F I L E D
FEB 16 1996

No. 95-953

In the Supreme Court of the United States

OCTOBER TERM, 1995

LIBERTY CABLE COMPANY, INC., PETITIONER

v.

CITY OF NEW YORK, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

The Cable Communications Policy Act of 1984, 47 U.S.C. 521 *et seq.* (1988 & Supp. V 1993) (the Cable Act), requires a person operating a cable system to obtain a franchise from a local franchising authority. 47 U.S.C. 541(b)(1) (Supp. V 1993). Until it was amended on February 8, 1996, by the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, the Cable Act defined the term cable system to include a facility that uses coaxial cable or wire to link two or more multi-unit buildings that are not commonly owned, controlled, or managed, even if the wire does not cross a public right-of-way. 47 U.S.C. 522(7) (Supp. V 1993). The question presented by the petition is:

Whether in this case petitioner presented a ripe First Amendment challenge to the provisions of the Cable Act that, until recently amended, required a franchise for cable systems serving non-commonly-owned, multi-unit buildings.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A7) is reported at 60 F.3d 961. The opinion of the district court (Pet. App. A23-A74) is reported at 893 F. Supp. 191.

JURISDICTION

The judgment of the court of appeals (Pet. App. A21-A22) was issued on July 12, 1995. A petition for rehearing was denied on September 18, 1995. Pet. App. A20. The petition for a writ of certiorari was filed on Monday, December 18, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Cable Communications Policy Act of 1984, 47 U.S.C. 521 *et seq.* (1988 & Supp. V 1993) (the Cable Act), established a "national framework for regulating cable television." *FCC* v. *Beach Communications, Inc.*, 113 S. Ct. 2096, 2099 (1993) (*Beach III*). The statute provides that "a cable operator may not provide cable service without a franchise," and contemplates that local governmental authorities will award such franchises. 47 U.S.C. 541(b)(1) (Supp. V 1993); see *Beach III*, 113 S. Ct. at 2099.

As pertinent here, "cable service" is "the one-way transmission to subscribers of (i) video programming, or (ii) other programming service," and a "cable operator" provides cable service over a "cable system." 47 U.S.C. 522(5) and (6)(A) (Supp. V 1993). A cable system is "a facility, consisting of a set of closed transmission paths and associated signal generation, reception, and control equipment that is designed to provide cable service * * * to multiple subscribers." 47 U.S.C. 522(7) (Supp. V 1993).

Until amended on February 8, 1996, by the Telecommunications Act of 1996, Pub. L. No. 104-104, § 301(a)(2), 110 Stat. 114-115, the definition of cable system excluded "a facility that serves only subscribers in 1 or more multiple unit dwellings under common ownership, control, or management, unless such facility or facilities use[] any public right-of-way." 47 U.S.C. 522(7)(B) (Supp. V 1993). The Court upheld the "common ownership" exemption against an equal protection challenge in *Beach III*, 113 S. Ct. at 2101-2104.

As discussed below (pp. 6-7, *infra*), the Telecommunications Act of 1996 has eliminated the

common ownership requirement contained in 47 U.S.C. 522(7)(B) (Supp. V 1993). As a result, "a facility that serves subscribers without using any public right-of-way"—irrespective of whether the subscribers are located in commonly-owned buildings—is no longer a cable system for purposes of the Cable Act's franchising and other requirements. Pub. L. No. 104-104, § 301(a)(2), 110 Stat. 114-115.

2. Petitioner provides video programming to customers in New York City. It receives satellite and broadcast television signals, which it then retransmits on microwave radio frequencies to reception antennae at multi-unit buildings throughout the area. Some of the buildings served by petitioner are not commonly owned, controlled, or managed and are linked by coaxial cable, albeit without using any public right-of-way. Pet. App. A34-A35, A104. As petitioner concedes, those "non-common" systems fell within the previous statutory definition of a cable system, 47 U.S.C. 522(7) (Supp. V 1993), and therefore required franchises. Pet. App. A105. Petitioner, however, did not obtain a franchise from the appropriate local authority, the Department of Information Technology and Telecommunications (DOITT). *Id.* at A106, A136. In 1993 and 1994, when petitioner constructed its non-common systems (see *id.* at A105), DOITT lacked a procedure for awarding franchises for the particular type of cable service offered by petitioner. *Id.* at A107. See note 3, *infra*.

3. In May 1994, Time Warner Cable of New York City and Paragon Cable Manhattan requested the New York State Commission on Cable Television (the State Commission) to investigate petitioner's non-common cable operations. The State Commission directed petitioner to show cause why it should not be

determined to be a cable system, subject to local franchising requirements, or, alternatively, why it should not be compelled to cease and desist such operations until it obtains a franchise. Pet. App. A135-A138. At petitioner's request, the State Commission held a public hearing on December 9, 1994. At the conclusion of the hearing, the State Commission orally issued a "standstill order," directing petitioner not to provide cable service to any new subscribers through "hard-wired interconnection absent common ownership, control or management." *Id.* at A151. The order, which was issued with the expectation of additional hearings, is to remain in effect until vacated by the State Commission. *Ibid.*[1]

4. The day before the State Commission hearing at which the standstill order was issued, petitioner filed a complaint in federal district court, which was later amended, seeking injunctive relief and a declaration that 47 U.S.C. 522(7) and 541(b) (1988 & Supp. V 1993)—the franchising requirements of the Cable Act — violate the First Amendment on their face and as applied to non-common cable systems such as petitioner's. Pet. App. A112-A114, A118-A119. The United States was not named as a defendant, but intervened, pursuant to 28 U.S.C. 2403(a), solely to defend the constitutionality of the statute.

The district court dismissed petitioner's First Amendment claim as not ripe. Pet. App. A41-A59. The court adhered to the reasoning of the District of Columbia Circuit in *Beach Communications, Inc.* v. *FCC*, 959 F.2d 975 (1992) (*Beach I*), which involved a

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[1] The regulatory authority of the State Commission has been transferred to the New York State Public Service Commission as of January 1, 1996. See Pet. 3 n.3.

virtually identical challenge to the Cable Act.[2] It applied the ripeness test set forth in *Abbott Labs.* v. *Gardner*, 387 U.S. 136 (1967), concluding that the claim was not fit for review because petitioner had not yet applied for a franchise, and neither the State Commission nor DOITT had taken any final action with respect to petitioner's non-common cable system. Pet. App. A44.

The district court additionally concluded that, because petitioner was unable to identify "the precise nature of the burdens imposed" by the franchising scheme, the court could not determine what level of scrutiny is appropriate for petitioner's First Amendment challenge. Pet. App. A47. The record was inadequate to make that decision. *Ibid.* The district court also ruled that the record did not support a finding that "any particular hardship will befall [petitioner] if judicial decision-making is withheld for now." *Id.* at A48. The court observed that the ripeness doctrine is intended to protect agencies such as the State Commission and DOITT from judicial interference until their decisions have become final. *Id.* at A51.

The district court also held that petitioner's due process claim was not ripe, noting that, after the complaint was filed, DOITT undertook to establish franchising procedures specifically designed for the type of non-common cable system operated by peti-

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[2] After the remand in *Beach I*, the case was appealed again, 965 F.2d 1103 (D.C. Cir. 1992) (*Beach II*), and then reversed on grounds other than ripeness in *Beach III*, 113 S. Ct. 2096 (1993). Following this Court's remand, the court of appeals rendered yet another decision, 10 F.3d 811 (D.C. Cir. 1993) (*Beach IV*).

tioner. Pet. App. A59-A61.[3] The court concluded that petitioner's equal protection claim was ripe, but it denied the request for a preliminary injunction. *Id.* at A69-A70, A71-A73. The court of appeals affirmed on the basis of the district court's opinion, adding "a few additional words of clarification" on the due process issue. *Id.* at A3-A7.

ARGUMENT

The district court and court of appeals correctly held that petitioner's First Amendment challenge to the Cable Act's franchise requirement was not ripe for judicial review. That ruling does not conflict with any decision of this Court or of any court of appeals. Moreover, as a result of the Telecommunications Act of 1996, which amended the Cable Act's definition of a "cable system," petitioner is no longer subject to the Cable Act's franchise requirement. The underlying First Amendment claim and the ripeness question presented here are consequently moot. Because the decision below did not warrant this Court's review and the events giving rise to mootness did not occur until after it was rendered, the petition for a writ of certiorari should be denied.

1. On February 8, 1996, the President signed into law the Telecommunications Act of 1996. Among

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[3] On February 24, 1995, DOITT instituted a rulemaking to establish procedures for the granting of such franchises. Pet. App. A33-A34. Under the procedures adopted, franchise applicants that seek to provide non-common cable service, without using public property, were to have submitted their proposals and supporting materials by January 31, 1996. Applicants authorized to negotiate for franchises were expected to be identified by March 1, 1996. All franchise agreements offered by DOITT are subject to approval by various state and local government authorities. See Pet. 6.

other things, the new legislation amends the Cable Act's definition of the term "cable system" by eliminating the common ownership requirement that was necessary to qualify for the exemption in 47 U.S.C. 522(7)(B) (Supp. V 1993). As a result, "a facility that serves subscribers without using any public right-of-way"—whether the subscribers are located in commonly-owned, or non-commonly-owned, buildings—is not a cable system for purposes of the Cable Act's franchising and other requirements. Pub. L. No. 104-104, § 301(a)(2), 110 Stat. 114-115. The non-common system here at issue, by which petitioner provides cable service to subscribers in buildings that are not commonly owned without using any public right-of-way, falls within the newly amended exemption from the definition of cable system. Consequently, the Cable Act no longer requires petitioner to obtain a franchise for its non-common system.[4]

In the instant action, petitioner sought no damages, but only declaratory and injunctive relief, including, as pertinent to the question presented to the Court here, a ruling that 47 U.S.C. 522(7)(B) and 541(b)(1) (Supp. V 1993) violated its First Amendment rights. See Pet. App. A112-A114, A118-A120. The lower courts held that those claims were not ripe for review. *Id.* at A5, A39-A59, A74. By repealing the common ownership requirement in the exception to the definition of cable system, however, the new Telecommunications Act has effectively given petitioner

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[4] The legislation does not contain any specific effective date applicable to that provision. Accordingly, it took effect on the date of the President's signature. See *Gozlon-Peretz* v. *United States*, 498 U.S. 395, 404 (1991).

the relief it initially sought from the courts. Not only is its underlying First Amendment claim now moot, it necessarily follows that the ripeness question presented by the petition is moot as well. See *Burke* v. *Barnes*, 479 U.S. 361, 363-364 (1987); *Hall* v. *Beals*, 396 U.S. 45, 48 (1969).[5]

2. Petitioner's claims would not have warranted this Court's review even in the absence of the new legislation.

a. Petitioner has erroneously characterized the State Commission's standstill order as a "prior restraint." See Pet. 12-15. The order, which petitioner agrees is interim (Pet. 21 n.16), simply preserved the status quo by prohibiting petitioner from establishing new non-common cable service or offering it to additional customers until the State Commission could complete its investigation and render a final decision, or until petitioner could receive a franchise, as it concedes (Pet. App. A105) the law required.

To be sure, the standstill order is in the form of an injunction, insofar as it directs petitioner to comply with the law and prevents certain activity subject to First Amendment protection. See *Turner Broadcasting Sys.* v. *FCC*, 114 S. Ct. 2445, 2456 (1994)

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[5] Petitioner may contend that it still could be subject to penalties imposed by the State Commission for the period during which it unlawfully provided cable service without a franchise. See Pet. App. A111. The State Commission, however, has not imposed, or threatened to impose, such penalties; indeed, its investigative proceeding is still pending. See *id.* at A135-A138, A147-A149, A150-A152. Petitioner's potential liability for fines was therefore not an issue considered by the courts below. It is also not an issue fairly encompassed within the question presented to this Court (see Pet. i).

("Cable programmers and cable operators engage in and transmit speech, and they are entitled to the protection of the * * * First Amendment."). As the Court noted in *Madsen* v. *Women's Health Center, Inc.*, 114 S. Ct. 2516, 2524 n.2 (1994), however, "[n]ot all injunctions which may incidentally affect expression * * * are 'prior restraints' in the sense that that term was used in *New York Times Co.* [v. *United States*, 403 U.S. 713 (1971)], or *Vance* [v. *Universal Amusement Co.*, 445 U.S. 308 (1980)]."

Here, as in *Madsen*, petitioner was "not prevented from expressing [its] message in any one of several ways," 114 S. Ct. at 2524 n.2. It was prevented only from providing unfranchised *new* cable service via a particular method—a non-common system. See also *Alexander* v. *United States*, 113 S. Ct. 2766, 2771 (1993) (order requiring forfeiture of assets acquired by violating federal obscenity laws was not prior restraint because petitioner could resume adult entertainment business with other assets).[6] Moreover, the standstill order "was not issued because of the content of [petitioner's] expression, as was the case in *New York Times Co.* and *Vance*, but because of [its] prior unlawful conduct." *Madsen*, 114 S. Ct. at 2524 n.2.

Indeed, because the standstill order merely directed petitioner to obey the law, the essence of its argument is, ineluctably, that the Cable Act's franchise requirement itself amounts to a prior restraint. Yet

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[6] Thus, the order did not prevent petitioner from creating additional "stand alone" systems by placing a microwave reception antenna atop each non-commonly owned building, so as to provide a form of cable service not subject to the Cable Act's former franchise requirement. See Pet. App. A104-A105.

none of the cases cited by petitioner supports the sweeping conclusion that a broadly applicable, content-neutral regulatory franchising requirement is a prior restraint. See, *e.g.*, *Organization for a Better Austin* v. *Keefe*, 402 U.S. 415 (1971) (vacating permanent injunction against distribution of leaflets); *Near* v. *Minnesota ex rel. Olson*, 283 U.S. 697 (1931) (invalidating court order that permanently enjoined newspaper from publishing future "malicious, scandalous and defamatory" articles). Compare *City of Los Angeles* v. *Preferred Communications, Inc.*, 476 U.S. 488 (1986) (holding that franchising of cable television implicates First Amendment interests, without any suggestion that franchise requirement itself is a prior restraint). Petitioner has thus "stretche[d] the term 'prior restraint' well beyond the limits established by [the Court's] cases." *Alexander*, 113 S. Ct. at 2771.

In any event, petitioner's attempt to characterize this case as involving a prior restraint is for naught. Even if it were correct to characterize this case in that way, petitioner is wrong in suggesting that any case involving a prior restraint is presumptively ripe for review. Pet. 13. None of the decisions cited by petitioner stands for that proposition, nor do they even address the issue of ripeness. See, *e.g.*, *Bantam Books, Inc.* v. *Sullivan*, 372 U.S. 58 (1963).

b. The question of ripeness is controlled instead by this Court's decision in *Abbott Labs.* v. *Gardner*, 387 U.S. 136 (1967). The Court's decision in that case identified two factors that should be considered in determining whether a controversy is ripe for adjudication—"the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Id.* at 149. Only one

other court of appeals, the District of Columbia Circuit, has addressed the ripeness of a First Amendment challenge to the Cable Act's franchise requirement. That court also applied the *Abbott Labs.* criteria and held that the claim was not ripe. See *Beach Communications, Inc.* v. *FCC*, 959 F.2d 975 (D.C. Cir. 1992) (*Beach I*).

In *Beach I*, companies like petitioner, which use satellite transmission and offer cable service to separately-owned, multi-unit buildings that are connected by wire without using public rights-of-way, sought judicial review of the Federal Communications Commission's (FCC's) "Cable Definition Rule." The rule made clear that systems like petitioner's were subject to the Cable Act, including its franchise requirement. 959 F.2d at 979-980. Like petitioner here, Beach and other cable companies argued, *inter alia*, that requiring them to obtain local franchises violated their First Amendment rights. The District of Columbia Circuit, however, declined to decide that issue. Noting that the statute gives local authorities "broad discretion to determine the substance and process of franchising," and that the burdens associated with various franchise regimes could vary widely—thus altering the standard of scrutiny—the court concluded that the First Amendment challenge was unfit for review. *Id.* at 983-984. The *Beach I* court also concluded that the cable companies' hardship as a consequence of deferred court review was "not so substantial as to require immediate decision" and thus the case was not ripe. *Id.* at 985.

As the district court stated in this case, "the *Beach I* Court's analysis is exactly on point." Pet. App. A44. The precise burdens to be imposed on a non-common system franchisee remained to be determined by

DOITT.[7] The district court correctly explained that "[m]any of the burdens are permissive rather than mandatory * * *, are graduated according to the number of channels delivered by the cable operator * * * or set limits that benefit prospective cable operators." *Id.* at A45-A46. Without knowing "what the ultimate mix of burdens might be[,] * * * it cannot be said what the appropriate level of scrutiny might be with which to evaluate [petitioner's] First Amendment challenge." *Id.* at A46-A47. *Beach I* reached precisely the same conclusion. See 959 F.2d at 984. See also *Turner*, 114 S. Ct. at 2456 ("not every interference with speech triggers the same degree of scrutiny under the First Amendment").

In short, factual development of the record would be needed before any informed judgment could be made concerning whether a franchise requirement for non-common cable systems would survive First Amendment scrutiny. The lower courts correctly found that issue presently unfit for judicial review. The district court's conclusion on that score, Pet. App. A47, is fully consistent with not only *Beach I*, but also this Court's reluctance to resolve other First Amendment challenges to cable television regulation without an adequately developed factual record. See *Turner*, 114 S. Ct. at 2470-2472 (remanding for further fact-finding

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[7] Relying on the affidavit of its president and a 1993 resolution of New York City, petitioner claims that the burdens associated with a cable franchise are already known. Pet. 9 & n.11, 23; see Pet. App. A139-A146, A159, A163-A164. Petitioner's assertions, however, are fundamentally speculative. At the time of the lower courts' consideration of petitioner's suit, DOITT had not decided whether the requirements it applies to other types of cable franchises would be applied to non-common systems as well.

on issues critical to resolution of First Amendment challenge to "must-carry" provision of cable statute); *Preferred Communications*, 476 U.S. at 494 (more thoroughly developed record necessary before Court could determine whether local cable franchising restrictions violated First Amendment).

With respect to the hardship criterion of *Abbott Labs.*, the district court found the record similarly lacking in facts showing "that any particular hardship will befall [petitioner] if judicial decision-making is withheld for now." Pet. App. A48. The court emphasized that, as in *Beach I*, 959 F.2d at 985, the costs and other burdens associated with franchising could not be ascertained yet, and no assumptions could be made as to how the local authorities would exercise their regulatory duties. Pet. App. A48.[8] While the court found little evidence of any hardship to petitioner, it found that the State Commission and DOITT would suffer "a substantial hardship" as a consequence of judicial interference with their ongoing proceedings. *Id.* at A53. See *Abbott Labs.*, 387 U.S. at 148 (a fundamental purpose of ripeness doctrine is "to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way"). Given the unfitness of the issue for review and the balance of the hardships, the district court properly decided, and the court of appeals agreed, that petitioner's First Amendment challenge to the Cable

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[8] The court also pointed out that, since June 1993, when the Court rendered its decision in *Beach III*, petitioner knew that the Cable Act's franchise requirement (prior to the 1996 amendment) applied to non-common systems that do not depend on the use of public rights-of-way. Pet. App. A52-A53.

Act's franchising requirement was not ripe for review.

Petitioner seeks to distinguish *Beach I* on the ground that it involved "a purely facial challenge" to the FCC's definition of cable system, whereas petitioner here challenges "enforcement" action. Pet. 20, 23. That purported difference, however, is overstated. As we have explained, the State Commission's standstill order in this case did nothing more than preserve the status quo pending completion of administrative proceedings and direct petitioner to comply with the law that, as petitioner concedes, then applied to its cable service. Petitioner was thus effectively in the same posture as the cable companies in *Beach I*, who then operated, or had concrete plans to operate, cable service like that here at issue. See 959 F.2d at 980 & n.6. At bottom, the same First Amendment challenge to the Cable Act's franchise requirement for non-common systems was before both the District of Columbia Circuit and the courts in this case. That claim was correctly found to be unripe, primarily because the burdens associated with franchising could not yet be ascertained in either case.

c. Finally, petitioner erroneously contends that the decision in this case departs from the ripeness analysis undertaken by other circuits. For instance, in *New Mexicans for Bill Richardson* v. *Gonzales*, 64 F.3d 1495 (10th Cir. 1995), the court held that a First Amendment challenge to a state restriction on the use of federal campaign contributions was ripe. The court reached that decision because it was persuaded by "[t]he facts presented" that the plaintiff faced "a direct and immediate dilemma with respect to [the] exercise of his First Amendment liberties." *Id.* at

1500. Furthermore, he had a reasonable fear of criminal prosecution for violating the statute. *Id.* at 1502. There is no comparable evidence in the instant case.

Petitioner's reliance on *Action for Children's Television* v. *FCC*, 59 F.3d 1249 (D.C. Cir. 1995), cert. denied, 116 S. Ct. 773 (1996) (*ACT*), is also misplaced.[9] At issue in *ACT* was a First Amendment challenge to the FCC's scheme for imposing forfeitures for the broadcast of indecent material. The court concluded that the claim of a broadcaster, who had already been subject to a forfeiture, was ripe. The court noted that "[t]here [was] no dispute about the working of the procedures being challenged and there [was] therefore little or nothing more that the agency could do in a particular adjudication that would likely inform the court's decision on the [First Amendment] question." *Id.* at 1258. Here, in sharp contrast, the franchising procedures were not yet developed, and, thus, the extent to which they might impede the exercise of protected speech could not be ascertained by the courts below.[10]

3. For the reasons stated in point 1, *supra*, this case has been rendered moot by events ocurring after the court of appeals rendered its decision. For the reasons stated in point 2, *supra*, review of that decision by this Court would not have been warranted even if the case had not become moot. Accordingly,

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[9] The petition (at 16) refers to that case as "*South Fork Broadcasting Corp.*"

[10] The fact that the court's ripeness analysis in *ACT* does not cite its own decision in *Beach I* also indicates that there is no tension between those cases or between *ACT* and the decision at issue here.

this Court should deny the petition for a writ of certiorari. Compare *Velsicol Chemical Corp.* v. *United States*, 435 U.S. 942 (1978) (denying certiorari in case that became moot after court of appeals rendered judgment) with *Department of Justice* v. *Provenzano*, 469 U.S. 14 (1984) (vacating and remanding, where statute enacted after certiorari was granted mooted the question presented). See Br. in Opp. in *Velsicol*, *supra*, at 4-11 (discussing why denial of certiorari is the appropriate disposition). Cf. *U.S. Bancorp Mortgage Co.* v. *Bonner Mall Partnership*, 115 S. Ct. 386, 390-393 (1994) (explaining that vacatur is an extraordinary equitable remedy and is not justified where case becomes moot due to settlement).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY 1996